

14-1363

TAX TYPE: SALES & USE TAX

TAX YEAR: 1-03 through 12-08

DATE SIGNED: 1-14-2015

COMMISSIONERS: J. VALENTINE, D. DIXON, M. CRAGUN, R. PERO

BEFORE THE UTAH STATE TAX COMMISSION

TAXPAYER,
Petitioner,

vs.

TAXPAYER SERVICES DIVISION OF THE
UTAH STATE TAX COMMISSION,

Respondent.

INITIAL HEARING ORDER

Appeal No. 14-1363

Account No. #####

Tax Type: Sales & Use Tax

Tax Year: 01/03 – 12/08

Judge: Marshall

Presiding:

Jan Marshall, Administrative Law Judge

Appearances:

For Petitioner: REPRESENTATIVE-1 FOR TAXPAYER, Owner
REPRESENTATIVE-2 FOR TAXPAYER, Owner’s wife

For Respondent: RESPONDENT-1, Taxpayer Services Division
RESPONDENT-2, Taxpayer Services Division

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission on October 30, 2014 for an Initial Hearing in accordance with Utah Code Ann. §59-1-502.5. The Petitioner (“Taxpayer”) is requesting a waiver of the late filing and late payment penalties and interest assessed on their sales tax filings for the following periods:

Period	Penalty Amount	Interest Amount
01/03 – 03/03	\$\$\$\$\$	\$\$\$\$\$
04/03 – 06/03	\$\$\$\$\$	\$\$\$\$\$
07/03 – 09/03	\$\$\$\$\$	\$\$\$\$\$
10/03 – 12/03	\$\$\$\$\$	\$\$\$\$\$
01/04 – 03/04	\$\$\$\$\$	\$\$\$\$\$
04/04 – 06/04	\$\$\$\$\$	\$\$\$\$\$
07/04 – 09/04	\$\$\$\$\$	\$\$\$\$\$
01/05 – 03/05	\$\$\$\$\$	\$\$\$\$\$
04/06 – 06/06	\$\$\$\$\$	\$\$\$\$\$
01/07 – 03/07	\$\$\$\$\$	\$\$\$\$\$
04/07 – 06/07	\$\$\$\$\$	\$\$\$\$\$

07/07 – 09/07	\$\$\$\$\$	\$\$\$\$\$
10/07 – 12/07	\$\$\$\$\$	\$\$\$\$\$
01/08 – 03/08	\$\$\$\$\$	\$\$\$\$\$
04/08 – 06/08	\$\$\$\$\$	\$\$\$\$\$
07/08 – 09/08	\$\$\$\$\$	\$\$\$\$\$
10/08 – 12/08	\$\$\$\$\$	\$\$\$\$\$

Interest continues to accrue on any unpaid balance.

APPLICABLE LAW

The Commission has been granted the discretion to waive penalties and interest. Utah Code Ann. §59-1-401(13) provides, “Upon making a record of its actions, and upon reasonable cause shown, the commission may waive, reduce, or compromise any of the penalties or interest imposed under this part.”

The Commission has promulgated Administrative Rule R861-1A-42 to provide additional guidance on the waiver of penalties and interest, as follows in pertinent part:

- (2) Reasonable Cause for Waiver of Interest. Grounds for waiving interest are more stringent than for penalty. To be granted a waiver of interest, the taxpayer must prove that the commission gave the taxpayer erroneous information or took inappropriate action that contributed to the error.
- (3) Reasonable Cause for Waiver of Penalty. The following clearly documented circumstances may constitute reasonable cause for a waiver of penalty:
 - (a) Timely Mailing...
 - (b) Wrong Filing Place...
 - (c) Death or Serious Illness...
 - (d) Unavoidable Absence...
 - (e) Disaster Relief...
 - (f) Reliance on Erroneous Tax Commission Information...
 - (g) Tax Commission Office Visit...
 - (h) Unobtainable Records...
 - (i) Reliance on Competent Tax Advisor...
 - (j) First Time Filer...
 - (k) Bank Error...
 - (l) Compliance History...
 - (m) Employee Embezzlement...
 - (n) Recent Tax Law Change...

Utah Code Ann. §59-1-1417 provides, “[i]n a proceeding before the commission, the burden of proof is on the petitioner...”

DISCUSSION

The Division’s representative noted that several of the periods requested were beyond the statute of limitations; specifically the periods ending March 2003 through June 2006. Additionally, an amount equal to tax had not been paid on all of the periods; and thus while the

Taxpayer requested a waiver of penalties and interest on all of the periods identified, only the penalties assessed for each of the periods of the 2007 tax year are at issue.

The Taxpayer submitted a letter dated April 5, 2014 that explained the basis for the request. The Owner started the business in 2002 with an acquaintance. He was to be a mechanic and salesperson, while his business partner was to handle the business side. The Owner developed what he described as an unhealthy pattern of pornography use, and to hide it from his wife, used business funds to pay for it.

Approximately a year after starting the business, tensions developed between the Owner and his business partner. He kept the retail and service part of the business, while his partner kept the online store. Shortly after he took over the business, he learned that his former business partner had neither filed nor paid tax returns, nor had he repaid investors who had financed the (X) for sale.

The Owner acknowledges that at that time he should have contacted the Tax Commission, filed the missing returns, and made payment arrangements. He was afraid that his former business partner would be held responsible too, and then retaliate by telling his wife about his pornography use. He hired someone to help him set up book-keeping software and tried to file the returns on his own, but was overwhelmed by the process. The Owner disclosed his problems to his wife approximately five years ago.

In 2009, the Owner's wife came into the business; she worked with the Tax Commission to come up with a payment plan the business could manage, and has taken over the books and filing returns. She stated that her husband was in a serious accident, and their youngest child is in elementary school, and they did not know whether the business would survive; but in spite of the recession, they have managed to remain current and pay off a lot of the past debt.

The Owner stated that the appeal is for clemency. He stated that he made a lot of mistakes, and was afraid of dealing with the consequences of his actions, which made the situation worse. He stated that with the current liens, there is no financing available to him.

The Division's representative noted that the last quarter that had any penalties assessed was the second quarter of 2009; and that the Owner's wife started handling the book-keeping in August of 2009. She stated that March 2008 is the earliest record of any notices being sent by the Commission to the Taxpayer. She stated that there may have been earlier notices, but because of a change in their software system, the records do not go back that far. She noted that notices of failure to file, statements of account, and lien notices were all sent to the Taxpayer, and that they are typically sent a month and a half after the due date of a return.

The Division's representative stated that the reasons given in the Taxpayer's waiver request were based on either financial hardship, or were because there were not proper checks and balances in place. She stated it was the Division's position that it was a lack of management skills that contributed to the late filing and late payment. She stated that they could not waive penalties as a first-time error because of the Taxpayer's compliance history, with errors dating back to the inception of the business.

In closing, the Owner stated that he knew there were penalties on the earlier periods. He stated that in hindsight, neither he nor his former partner knew how to handle the business; though his partner claimed to have the know-how. He stated that he used the sales tax funds to both support his pornography addiction and the overhead of the business. He stated that he spent over \$\$\$\$ to support his addiction, but when the recession hit, he no longer had the money for it and came clean. He got help for his addiction, and he and his wife started working together to take responsibility.

The Commission has promulgated Administrative Rule R861-1A-42 and Publication 17 to outline the circumstances the Commission may consider "reasonable cause" justifying a waiver of penalties. The Taxpayer has asked for a waiver of penalties on the grounds of death or serious illness and/or embezzlement. Under Subsection (3)(c) of the Administrative Rule, penalties may be waived if the death or serious illness of taxpayer or a member of the taxpayer's immediate family caused the delay. Subsection (3)(c)(iii) specifically provides, "the death or illness must have occurred on or immediately prior to the due date of the return." The Owner's pornography addiction was an ongoing problem, and there was not a specific event that occurred on or immediately before the due date of the return. Subsection (3)(m) of the Administrative Rule provides that employee embezzlement may also be reasonable cause for a waiver of penalties. In this instance, it was not an employee who was embezzling funds from the business, but rather the business owner. There does not appear to be reasonable cause to waive the penalties.

Taxpayer has also requested a waiver of interest. With regard to the waiver of interest, Rule R861-1A-42 specifically provides, "[g]rounds for waiving interest are more stringent than for penalty. To be granted a waiver of interest, you must prove that the commission gave the taxpayer erroneous information or took inappropriate action that contributed to the error."

Taxpayer has not shown that there was a Tax Commission error, or that a Tax Commission employee provided them with erroneous information that contributed to the errors. There is not reasonable cause to waive the interest assessed on the periods at issue.

Jan Marshall
Administrative Law Judge

DECISION AND ORDER

Based on the foregoing, the Commission denies the Taxpayer's request for a waiver of penalties and interest for the periods at issue. It is so ordered.

This decision does not limit a party's right to a Formal Hearing. However, this Decision and Order will become the Final Decision and Order of the Commission unless any party to this case files a written request within thirty (30) days of the date of this decision to proceed to a Formal Hearing. Such a request shall be mailed to the address listed below and must include the Petitioner's name, address, and appeal number:

Utah State Tax Commission
Appeals Division
210 North 1950 West
Salt Lake City, Utah 84134

Failure to request a Formal Hearing will preclude any further appeal rights in this matter.

DATED this _____ day of _____, 2015.

John L. Valentine
Commission Chair

D'Arcy Dixon Pignanelli
Commissioner

Michael J. Cragun
Commissioner

Robert P. Pero
Commissioner

Notice of Payment Requirement: Any balance due as a result of this order must be paid within thirty (30) days of the date of this order, or a late payment penalty could be applied.